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Attorney for Defendant

ABC Legal Services, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KYLE BRITTON,

Plaintiff,

vs.

ABC LEGAL SERVICES, INC.;
ET. AL.,

Defendants.

Case No. 5:17-cv-07070-LHK

ABC'S ANSWER TO THE FIRST
AMENDED COMPLAINT

Judge: Hon. Lucy H. Koh
Ct.: 8

Hearing: 12/12/18 – 2:00p.m.

Location: San Jose Courthouse
280 S. 1st St. Fl. 4
San Jose, CA 95113

Defendant ABC LEGAL SERVICES, INC., for itself and no others, answers
Plaintiff's first amended complaint ("FAC") as follows:

1. As answer to paragraph 1, though Plaintiff makes no affirmative
allegation regarding ABC's conduct, ABC lacks knowledge or information
sufficient to form a belief about the truth of the matters and on that basis denies
each and every allegation.

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1 2. As answer to paragraph 2, though Plaintiff makes no affirmative
2 allegation regarding ABC's conduct, ABC lacks knowledge or information
3 sufficient to form a belief about the truth of the matters and on that basis denies
4 each and every allegation.

5 3. As answer to paragraph 3, though Plaintiff makes no affirmative
6 allegation regarding ABC's conduct, ABC lacks knowledge or information
7 sufficient to form a belief about the truth of the matters and on that basis denies
8 each and every allegation.

9 4. As answer to paragraph 4, though Plaintiff makes no affirmative
10 allegation regarding ABC's conduct, ABC lacks knowledge or information
11 sufficient to form a belief about the truth of the matters and on that basis denies
12 each and every allegation.

13 5. As answer to paragraph 5, though Plaintiff makes no affirmative
14 allegation regarding ABC's conduct, ABC lacks knowledge or information
15 sufficient to form a belief about the truth of the matters and on that basis denies
16 each and every allegation.

17 6. As answer to paragraph 6, though Plaintiff makes no affirmative
18 allegation regarding ABC's conduct, ABC lacks knowledge or information
19 sufficient to form a belief about the truth of the matters and on that basis denies
20 each and every allegation.

21 7. As answer to paragraph 7, ABC admits each and every allegation set
22 forth therein.

23 8. As answer to paragraph 8, ABC admits process server John Gonzalez
24 reported two unsuccessful attempts to serve Plaintiff prior to June 14, 2014, but
25 denies each and every remaining allegation set forth therein.

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1 9. As answer to paragraph 9, ABC denies that it created a fraudulent
2 affidavit, but admits that process server John Gonzalez signed a proof of
3 substituted service as described.

4 10. As answer to paragraph 10, ABC denies each and every allegation set
5 forth therein.

6 11. As answer to paragraph 11, ABC denies that it created a fraudulent
7 “Declaration of Reasonable Diligence,” denies that “[n]o one . . . told ABC’s
8 process server that plaintiff ‘only’ received mail at that address,” but admits each
9 and every remaining allegation set forth therein.

10 12. As answer to paragraph 12, ABC admits each and every allegation set
11 forth therein.

12 13. As answer to paragraph 13, though Plaintiff makes no affirmative
13 allegation regarding ABC’s conduct, ABC lacks knowledge or information
14 sufficient to form a belief about the truth of the matters and on that basis denies
15 each and every allegation.

16 14. As answer to paragraph 14, though Plaintiff makes no affirmative
17 allegation regarding ABC’s conduct, ABC lacks knowledge or information
18 sufficient to form a belief about the truth of the matters and on that basis denies
19 each and every allegation.

20 15. As answer to paragraph 15, though Plaintiff makes no affirmative
21 allegation regarding ABC’s conduct, ABC lacks knowledge or information
22 sufficient to form a belief about the truth of the matters and on that basis denies
23 each and every allegation.

24 16. As answer to paragraph 16, though Plaintiff makes no affirmative
25 allegation regarding ABC’s conduct, ABC lacks knowledge or information

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1 sufficient to form a belief about the truth of the matters and on that basis denies
2 each and every allegation.

3 17. As answer to paragraph 17, ABC admits that the Los Angeles
4 Superior Court denied the motion, but denies the court failed to determine the issue
5 of whether ABC's affidavit of service was fraudulent.

6 18. As answer to paragraph 18, ABC denies each and every allegation set
7 forth therein.

8 19. As answer to paragraph 19, ABC denies each and every allegation set
9 forth therein.

10 20. As answer to paragraph 20, ABC denies each and every allegation set
11 forth therein.

12 21. As answer to paragraph 21, ABC denies each and every allegation set
13 forth therein.

14 22. As answer to paragraph 22, ABC denies each and every allegation set
15 forth therein.

16 23. As answer to paragraph 23, ABC admits each and every allegation set
17 forth therein.

18 24. As answer to paragraph 24, ABC admits each and every allegation set
19 forth therein.

20 25. As answer to paragraph 25, though Plaintiff makes no affirmative
21 allegation regarding ABC's conduct, ABC lacks knowledge or information
22 sufficient to form a belief about the truth of the matters and on that basis denies
23 each and every allegation.

24 26. As answer to paragraph 26, though Plaintiff makes no affirmative
25 allegation regarding ABC's conduct, ABC lacks knowledge or information

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1 sufficient to form a belief about the truth of the matters and on that basis denies
2 each and every allegation.

3 27. As answer to paragraph 27, ABC denies each and every allegation set
4 forth therein.

5 28. As answer to paragraph 28, ABC repeats its answers to paragraphs 1
6 through 27 and incorporates those answers by reference as though fully stated
7 herein.

8 29. As answer to paragraph 29, though Plaintiff makes no affirmative
9 allegation regarding ABC's conduct, ABC lacks knowledge or information
10 sufficient to form a belief about the truth of the matters and on that basis denies
11 each and every allegation.

12 30. As answer to paragraph 30, ABC denies each and every allegation set
13 forth therein.

14 31. As answer to paragraph 31, ABC denies each and every allegation set
15 forth therein.

16 32. As answer to paragraph 32, ABC denies each and every allegation set
17 forth therein.

18 33. As answer to paragraph 33, ABC denies each and every allegation set
19 forth therein.

20 ABC denies each and every material allegation not heretofore controverted
21 and demands strict proof thereof.

22 **1ST AFFIRMATIVE DEFENSE**

23 As a separate affirmative defense, ABC alleges it may not be held liable in
24 any action brought under the FDCPA because any violation of that act was not
25 intentional and resulted from a bona fide error; in that, any mistake on ABC's part

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1 in verifying Plaintiff's residence at the time of service was not intentional because
2 the person who accepted service affirmatively acknowledged that Plaintiff received
3 mail at the residence and ABC has reasonable procedures in place to avoid
4 knowingly attempting or effecting service at incorrect addresses. 15 U.S.C. §
5 1692k(c).

6 **2ND AFFIRMATIVE DEFENSE**

7 As a separate affirmative defense, assuming arguendo that ABC violated the
8 FDCPA, that Plaintiff has proper standing to bring a claim for such violations, and
9 that this Court has jurisdiction over the parties and claims, Plaintiff's statutory
10 penalties cannot be awarded on a per violation basis or on a per defendant basis.

11 **3RD AFFIRMATIVE DEFENSE**

12 As a separate affirmative defense, ABC alleges that Plaintiff is barred from
13 any recovery against ABC by the doctrine of laches, because Plaintiff delayed
14 filing suit against ABC, or even giving ABC notice of the alleged falsified proof of
15 service, until after an order was signed in the state court regarding whether or not
16 to set aside the default judgment entered there, an order stemming from a motion to
17 which ABC was given no notice and was thus deprived fair opportunity to be
18 heard.

19 **4TH AFFIRMATIVE DEFENSE**

20 As a separate affirmative defense, ABC alleges that if Plaintiff incurred
21 actual damages, Plaintiff, upon information and belief, failed to mitigate said
22 damages. Because Plaintiff failed in his Complaint to specify the actual damages
23 incurred, ABC has been deprived of the opportunity to intelligently respond and
24 hereby requests leave to amend this response upon discovery of the specifics of
25 Plaintiff's alleged actual damages.

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5TH AFFIRMATIVE DEFENSE

As a separate affirmative defense, ABC alleges that if Plaintiff incurred actual damages, ABC's acts or omissions were not a proximate cause of said damages. Because Plaintiff failed in his Complaint to specify the actual damages incurred, ABC has been deprived of the opportunity to intelligently respond and hereby requests leave to amend this response upon discovery of the specifics of Plaintiff's alleged actual damages.

6TH AFFIRMATIVE DEFENSE

As a separate affirmative defense, ABC alleges it cannot be held liable as a process server under the FDCPA. 15 U.S.C. § 1692a(6)(D).

7TH AFFIRMATIVE DEFENSE

As a separate affirmative defense, ABC alleges Plaintiff's causes of action are barred by California's litigation privilege in that ABC's complained of acts, filing a proof of service, were statements made during the course of litigation and were not known by ABC to be false.

8TH AFFIRMATIVE DEFENSE

As a separate affirmative defense, ABC alleges it is not liable for an agent's intentional, independent acts not ratified by ABC nor is ABC liable for an agent's frolic to the extent that ABC's agent, process server John Gonzalez, intentionally lied, if at all, about any of the circumstances and events surrounding the service of process in question.

9TH AFFIRMATIVE DEFENSE

As a separate affirmative defense, ABC alleges it had a good faith belief that service of process had been properly effected and third parties knowingly and intentionally, by way of intentional misrepresentation and/or fraud, induced ABC

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1 into that belief where they affirmatively acknowledged that the service address was
2 Plaintiff's mailing address.

3 **10TH AFFIRMATIVE DEFENSE**

4 As a separate affirmative defense, ABC alleges, on the basis of the *Rooker-*
5 *Feldman* doctrine, that this Court is deprived of jurisdiction to hear this action or
6 review state court judicial proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413,
7 415-416 (1923); *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 476
8 (1983); *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008).

9 **11TH AFFIRMATIVE DEFENSE**

10 As a separate affirmative defense, ABC alleges, on the basis of collateral
11 estoppel and res judicata, that Plaintiff cannot here re-litigate the issue of
12 sufficiency of process where that issue was prior adjudicated and decided on the
13 merits in the state court proceedings. *Younie v. Gonya (In re Younie)*, 211 B.R.
14 367, 373 (B.A.P. 9th Cir. 1997); 28 U.S.C. § 1738.

15 **12TH AFFIRMATIVE DEFENSE**

16 As a separate affirmative defense, ABC alleges, on the basis of the *Noerr-*
17 *Pennington* doctrine, that Plaintiff's claims are barred to the extent that this Court
18 cannot construe the FDCPA in such a way that burdens the protections afforded by
19 the First Amendment's Petition Clause.

20 **13TH AFFIRMATIVE DEFENSE**

21 As a separate affirmative defense, ABC alleges that Plaintiff's claims are
22 barred by the applicable statute of limitations where Plaintiff knew of his
23 allegation of insufficiency of service of process for more than a year prior to filing
24 this action.

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1 Date: September 6, 2018

Respectfully submitted,

2 **HOESTENBACH LAW**

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4 By: /s/ Hunter H. Hoestenbach

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10 ATTORNEY FOR ABC

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